MARIS HOUSING SDN BHD & ANOR

v.

LEE SENG WAI

HIGH COURT MALAYA, KUALA LUMPUR
MOHD HISHAMUDIN YUNUS J
[CIVIL SUIT NO: S22-640-2003]
4 NOVEMBER 2003

CIVIL PROCEDURE: *Injunction - Interlocutory injunction - To prevent defendant from acting as counsel for co-defendants sued by plaintiff in subordinate court - Whether plaintiff's application to High Court for injunctive and declaratory relief against defendant appropriate - Whether plaintiff should have raised preliminary objection before subordinate court or filed formal application thereat to disqualify defendant*

LEGAL PROFESSION: *Practice and etiquette - Pecuniary interest - Defendant acting as counsel for co-defendants - Whether sufficient to show defendant 'pecuniarily interested' in outcome of suit brought by plaintiff - Whether plaintiff must establish that defendant 'directly pecuniarily interested' - Whether defendant only 'indirectly pecuniarily interested' - Legal Profession (Practice & Etiquette) Rules 1978, s. 27*

This was an application by the plaintiffs under O. 29 r. 1 Rules of the High Court 1980 ('RHC') for an interlocutory injunction to restrain the defendant, an advocate and solicitor, from representing the owners of certain shop-lots within a shopping complex who were being sued by the plaintiffs (in the subordinate courts) for maintenance fees. The plaintiffs were the developers of the shopping complex whilst the defendant was the owner of one of the said shop-lots. The shop-lot owners had been disputing the plaintiffs' right to unilaterally increase the maintenance fees.

In seeking the interlocutory injunction, the plaintiffs contended that there would be a conflict of interest if the defendant were allowed to represent the shop-lot owners of whom he himself was one. It was contended that the defendant would have a pecuniary interest in the outcome of the subordinate-court suits brought by the plaintiffs against the shop-lot owners (s. 27 Legal Profession (Practice & Etiquette) Rules 1978).

Held (dismissing the application):

[1] The plaintiffs' writ action in the High Court (Civil Suit No. S22-640-2003) for a declaration and an injunction against the defendant disclosed **no** cause of action against the defendant. Consequently, the plaintiffs had **no** right to apply for the present interlocutory injunction against the defendant. The plaintiffs should **not** have moved the High Court for a declaration or a permanent or interlocutory injunction against the defendant; they should have pursued their challenge by way of a preliminary objection in their suits before the subordinate courts, or by way of a formal application under O. 53. r. 11 Subordinate Courts Rules 1980. (pp 657 f, 659 e-h & 660 a-h)

[2] It was **not** sufficient for the plaintiffs to merely show that the defendant was 'pecuniarily interested' in the outcome of the subordinate-court suits brought by the plaintiffs against the shop-lot owners. The plaintiffs must establish that the defendant was '**directly** pecuniarily interested'. The facts, however, only showed that the defendant was '**indirectly** pecuniarily interested'. (pp 657 g & 658 a-f)

Case(s) referred to:
Eshah Sa'at [1975] 2 MLJ 97 ***(refd)***
Sinwara Sdn Bhd v. Maris Housing Sdn Bhd & Ors [2003] 6 MLJ 771 ***(dist)***

Legislation referred to:
Legal Profession (Practice and Etiquette) Rules 1978, rr. 3, 4, 5, 9, 27
Rules of the High Court 1980, O. 29 r. 1
Specific Relief Act 1950, ss. 41, 54(i)
Subordinate Courts Rules 1980, O. 53 r. 11

Other source(s) referred to:
Pollock & Mulla, *Indian Contract & Specific Relief Acts*, 12th edn, vol II, p 2702

For the plaintiffs - Christine Lim; M/s Shariff & Som
For the defendant - Edwin Lim; M/s Edwin Lim & Suren

Reported by Gan Peng Chiang

JUDGMENT

Mohd Hishamudin Yunus J:
This is an interlocutory application by the plaintiffs pursuant to O. 29 r. 1 of the Rules of the High Court 1980 for an interlocutory injunction to restrain the defendant, an advocate and solicitor, from representing owners of shop lots in a shopping complex sued by the plaintiffs in the subordinate courts. In the civil suits in the subordinate courts, the plaintiffs are claiming against the shop

lots owners for the payment of maintenance fee in respect of the shopping complex. The case numbers of the civil suits, all instituted in the subordinates courts of Kuala Lumpur, are specified in a list annexed to the statement of claim and the summons in chambers.

The 1st plaintiff company is the developer of a shopping complex in Kuala Lumpur, known as "Kompleks Desa".

The 2nd plaintiff company was appointed by the 1st plaintiff to be in charge of the management of the shopping complex. One of the duties of the 2nd plaintiff is to collect the maintenance fee, on behalf of the 1st plaintiff, from the owners of the shop lots in the shopping complex.

In the sale and purchase agreements between the 1st plaintiff and the shop lots owners, the former is given the right to collect maintenance fee from the latter. Such fee is to be utilized for the maintenance of the shopping complex.

The defendant is one of the owners of the shop lots in the shopping complex.

There is a dispute between the plaintiffs and some of the owners of the shop lots, including the defendant, regarding the right of the plaintiff to unilaterally increase the maintenance fee under the sale and purchase agreements. The plaintiffs contend that they have the right under the sale and purchase agreements to unilaterally increase the maintenance fee, and allege that some of the owners of the shop lots are in breach of the sale and purchase agreements by refusing to pay the increased maintenance fee. The owners of the shop lots concerned, on the other hand, maintain that it is the plaintiffs themselves who are in breach of the sale and purchase agreements by imposing a maintenance fee which is excessive and not permissible under the agreements.

The plaintiffs have filed civil actions against the said owners of the shop lots (including the defendant) in the subordinate courts in Kuala Lumpur to recover the maintenance fee allegedly due to the plaintiffs. The names and numbers of the relevant civil suits are specified in a list (the suit against the defendant, however, is not included in the list) annexed to the statement of claim and also to present summons in chambers. The defendants in the subordinate courts cases have appointed the defendant to represent them as counsel.

The plaintiffs object to the defendant acting as counsel for the defendants in the subordinate courts on the ground that such an appointment results in a conflict of interest. The plaintiffs argue that since the defendant is one of the owners of the shop lots who dispute the plaintiffs' right to increase the maintenance fee, and is also one of those sued by the plaintiffs' in the subordinate courts for refusing to pay the maintenance fee, therefore, he has a pecuniary interest in the outcome of the cases. It is argued by the plaintiffs

that should the outcome of the suits in the subordinate courts be in favour of the defendants, then, the defendant will also benefit financially from the decision of the courts. The plaintiffs cite the provisions rr. 3, 4, 5, 9 and 27 of the Legal Profession (Practice and Etiquette) Rules 1978, and the case of *Sinwara Sdn. Bhd. v. Maris Housing Sdn Bhd & Ors* [2003] 6 MLJ 771.

The plaintiffs, however, place emphasis more on r. 27. This rule provides as follows:

27 Advocate and solicitor not to appear where pecuniarily interested.

(a) An advocate and solicitor shall not appear in any matter in which he is directly pecuniarily interested.

(b) This rule does not apply to the case of an advocate and solicitor appearing himself to tax his own costs.

On 22 May 2003 the plaintiffs filed a writ action against the defendant seeking, *inter alia*,:

(a) a declaration that the defendant by representing the shop lots owners in the various suits specified in the annexure to the statement of claim places himself in a conflict of interest situation and is in breach of rr. 3, 4, 5, 9 and, particularly, 27 of the Legal Profession (Practice and Etiquette) Rules 1978; and

(b) an injunction to restrain the defendant in the present case from representing the defendants in suits listed in the annexure.

On the same day itself, the plaintiffs filed the present interlocutory application (encl. 4).

I have dismissed the present interlocutory application with costs.

In my judgment, the plaintiffs in the main action (ie, the present High Court civil suit) have no cause of action against the defendant. And since the plaintiffs have no cause of action in the main suit, therefore, they have no right to apply for an interlocutory injunction.

Rules 3, 4, 5, and 9 of the Legal Professions (Practice and Etiquette) Rules are, to my mind, clearly irrelevant, and although they are cited in the pleadings and the affidavits, the learned counsel for the plaintiffs in her written submission – and, rightly, I should say – does not seem to place much reliance on them. As said above, the plaintiffs stress more on r. 27.

Thus, in this judgment, I shall confine myself only to r. 27. It is pertinent to observe that para. (a) of r. 27 uses the phrase:

> … directly pecuniarily interested … (emphasis is added)

In my view, what this means is that it is not sufficient for the plaintiffs invoking the rule merely to show that the defendant is pecuniarily interested in the subordinate courts cases. The plaintiffs must show that the defendant is directly pecuniarily interested in those cases.

Now, it cannot be denied that in the subordinate courts cases, if the courts were to hold that the plaintiffs have no right under the sale and purchase agreements to unilaterally increase the maintenance fee, such a decision will also benefit the defendant in the present action. For, such a decision will mean that the defendant, like the other shop lots owners, will not be liable to pay the maintenance fee at the new increased rate, unilaterally imposed by the plaintiffs: he is only liable to pay the maintenance fee at the rate prior to the unilateral increment. However, be that as it may, I am not prepared to go as far as holding that, just because the defendant in the present case is one of the owners of the shop lots who dispute the plaintiffs' right to unilaterally increase the maintenance fee, and is one of those owners of shop lots sued by the plaintiffs in the subordinate courts, therefore, he must be taken to be "directly pecuniarily interested" in those cases. My reason for so saying is that he is not a party to any of the civil suits mentioned in the annexure and, thus, any order that the subordinate court might make in any of those cases will not directly affect him. In my view, at best, by reason of the facts mentioned on the position of the defendant (that the defendant is one of the owners of the shop lots and that there is also a similar pending suit against him in the subordinate courts) he can only be said to be indirectly pecuniarily interested in those cases.

As for *Sinwara*, the case relied upon by the plaintiffs, there the plaintiff (Sinwara Sdn Bhd) is also one of the shop lots owners in the same shopping complex (Kompleks Desa) as in the present case; and the defendants in that case are the plaintiffs in the present case. The issue in Sinwara is similar as the issue in the present case: whether the defendants there (the plaintiffs in the case before me) can unilaterally increase the maintenance fee in respect of the shopping complex. In *Sinwara*, the present defendant, Encik Lee Seng Wai, acted as counsel for the plaintiff. At the commencement of the hearing of that action, the defendants in that case raised a preliminary objection, objecting to Encik Lee Seng Wai appearing as counsel for the plaintiff on the ground that Encik Lee (to quote the facts of the case as narrated in the reported judgment) "is an owner of one of the lots and is therefore an interested party and has a pecuniary interest." The defendants in that case relied on rr. 3, 4, 5 and 27 of the Legal Profession (Practice and Etiquette) Rules 1978.

The preliminary objection was upheld by the learned judge. With respect, my difficulty in appreciating the judgment is that the learned Judge did not explain whether his decision was based on all the four specified rules (namely, rr. 3, 4, 5 and 27) read together or whether his decision was based only on a particular rule or only on some of the four rules mentioned. In his judgment, the learned judge began with explaining the purpose of the rules as follows:

> The objection was raised under rr. 3, 4, 5 and 27 of the Legal Profession (Practice and Etiquette) Rules 1978. The purpose of the rule is to ensure that counsel appearing before the courts can argue objectively; thereby being able to assist the courts to arrive at a fair and just decision. If counsel were in an objective position, courts can have a greater confidence in the sincerity and candour of counsel's assessment of the facts. Such an objective counsel is in fact in a better position to represent his client's interest to obtain a fair and just decision.

Then, at a later part of the judgment, his lordship merely concluded:

> Being in the same position as the plaintiff, counsel has an interest in the result.

Be that as it may, with respect, I am unable to share the views of the learned judge in the case cited, based on the reasons that I have already given above.

In any case, I think that I should also add that Sinwara, on the facts, can be distinguished from the present case. There, unlike in the present case, there was no application for an injunction, whether permanent or interlocutory, to prevent Encik Lee from representing his client. In that case, in objecting to Encik Lee representing his client, the defendants had adopted the correct procedure: they had put forward their objection by way of a preliminary objection.

Now, even assuming that the defendant in the present case, by representing the shop lots owners in the civil suits in the subordinate courts, is in breach of r. 27 (or any of the rules) of the Legal Profession (Practice and Etiquette) Rules, still, in my judgment, seeking a declaration or an injunction in the High Court is not the appropriate course of action to be taken by the plaintiffs. As a rule, a High Court should not grant a declaration or an injunction if the aggrieved party concerned could have recourse to an alternative and equally efficacious legal remedy. Section 54(i) of the Specific Relief Act 1950 provides that an injunction cannot be granted when equally efficacious relief can certainly be obtained by other usual mode of proceeding. And it has been decided in *Eshah binti Sa'at v. Meriam binti Sa'at* [1975] 2 MLJ 97 that the court will not grant a declaration to a litigant if an alternative remedy is available to the litigant.

As for declaration, there is another reason as to why on the facts of the present case seeking a declaration is not an appropriate course of action. Section 41 of the Specific Relief Act provides that any person entitled to any "legal character", or to any "right as to any property", may institute a suit against any person denying, or interested to deny, his entitlement to the "legal character" or to the "right as to any property". However, from the facts of the present case and prayer (a) above, it is to be observed that the action by the plaintiffs against the defendant in the case that is now before me has nothing to do with either the plaintiffs' entitlement to any "legal character" or the plaintiffs' right as to any property. That the present proceeding has nothing to do with the plaintiffs' right to property is obvious. But the same cannot be said in relation to the term "legal character". What is meant by "legal character", the term used by s. 41? In *Indian Contract & Specific Relief Acts* by Pollock & Mulla, 12th edn. Vol II, p. 2702, the learned authors explain the term as follows:

> A man's 'legal character' is the same thing as his status which is constituted by the attributes the law ascribes to him in his individual and personal capacity. … Questions relating to minority, rank, caste, official position, civil death, illegitimacy or legitimacy, nationality are about legal character of a person. It refers to a position recognized by law.

As I see it, on the facts, the present action is concerned with the legal right of the defendant, rather than with the legal right or legal character of the plaintiffs: the right of the defendant, an advocate and solicitor, to represent his clients in the subordinate courts. Thus, on the basis of the issue raised by the plaintiffs themselves, and considering the ambit of s. 41, declaration is not a remedy available to the plaintiffs.

To my mind, in the present case, the plaintiffs have an appropriate course of action which they should have pursued. In the first place, they need not have to come to the High Court. Instead, they could have easily sought the appropriate remedy at the very forum where they have actually instituted their actions against the shop lots owners – the subordinate courts of Kuala Lumpur. In the present case, all the plaintiffs have to do, if they believe that the defendant in the present case is in breach of the Legal Profession (Practice and Etiquette) Rules, is to make an application in the lower courts, in each of the relevant civil suits, for the defendant in the present case to be disqualified from representing the defendant in the particular lower court action. The application can either be by way of a preliminary objection (at the appropriate time – just like what the defendants in *Sinwara* have done), or better still, by way of a formal application. The application should be pursuant to O. 53 r. 11 of the Subordinate Courts Rules 1980.